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No. 453

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE PENFIELD COMPANY OF CALIFORNIA AND A. W. YOUNG, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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OPINION BELOW

The opinion of the circuit court of appeals, as amended (R. 95–98), is officially reported in 157 F. 2d 65. The district court rendered no opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 25, 1946 (R. 100), and rehearing was denied on July 16, 1946 (R. 99). The petition for a writ of certiorari was granted on November 18, 1946. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 22 (a) of the Securities Act of 1933 (15 U. S. C. 77v (a)).

QUESTIONS PRESENTED

Upon application of the Securities and Exchange Commission, petitioners were ordered to produce specified books and records relating to an investigation being conducted by the Commission. Petitioners refused to comply with this order, even after it was affirmed on appeal. The Commission thereupon moved the district court to enter a decree of contempt for the purpose of securing compliance with the subpoena order. The district court, although finding petitioners in contempt, refused a coercive decree calculated to obtain compliance; instead, it imposed an unconditional fine of $50. On appeal, the circuit court of appeals held that the district court's action frustrated the "remedial purpose of the legislation creating the right to secure access to the documents," and accordingly instructed the district court to enter an order requiring petitioner Young's imprisonment, conditional upon his compliance with the subpoena order.[1]

[1] The order adjudging the contempt was directed at petitioner Young as secretary-treasurer of the Penfield Company (R. 19). Both Young and the Company were, without objection, designated as appellees in the court below (R. 87) and both filed the petition for a writ of certiorari.

The principal question presented is whether, in these circumstances, the court below (a) had the power to review the refusal of a coercive decree, and (b) properly exercised its supervisory jurisdiction to correct the disposition of the case made by the district court. A subsidiary question is whether, in view of petitioners' failure to proffer compliance upon their appearance in the contempt proceedings and their failure to appeal from the judgment of the district court holding Young in contempt, petitioners may now question the adequacy of the notice given by the Commission of the new date for production of the records; and assuming this question to be still open, whether petitioners did not have sufficient notice thereof.

STATUTES INVOLVED

The applicable provisions of the Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77 (a), *et seq.*) (the "Act") and Section 268 of the Judicial Code (28 U. S. C. 385) are set forth in the Appendix, *infra*, pp. 37–38.

STATEMENT

The Commission, pursuant to Section 20 (a) of the Act, Appendix, *infra*, p. 37, issued an order on May 14, 1942, and supplemental orders on February 13, 1943, and April 8, 1943, directing an investigation to determine whether a number of specified companies and persons (petitioners being added in the April 1943 supplemental order) had violated Sections 17 (a) and 5 (a) of the Act (15

U. S. C. 77q (a) and 77e (a)). The inquiry related to the possible sale of stock and other securities of petitioner, The Penfield Company of California ("Penfield"), by means of untrue statements of material facts and without registration (R. 2–3, 7; see *Penfield Company of California* v. *Securities and Exchange Commission*, 143 F. 2d 746, 747–8 (C. C. A. 9), certiorari denied, 323 U. S. 768). In the course of this investigation, and pursuant to Section 19 (b) of the Act, Appendix, *infra*, p. 37, the Commission directed a subpoena *duces tecum* to petitioner Young, as an officer of Penfield (R. 3–4). The subpoena required the production of certain books and records of Penfield covering the four-year period from May 1, 1939, to the date of the subpoena, April 9, 1943. See *Penfield Co. of California* v. *Securities and Exchange Commission*, 143 F. 2d 746, 748. Upon Young's refusal to appear and produce the specified books and records, the Commission, on April 13, 1943, filed an application in the district court for an order enforcing the subpoena (R. 2, 4; see R. 79).

On June 1, 1943, after hearing, the court granted the Commission's application, specifically ordering Young, as secretary-treasurer of Penfield, to produce the specified items on June 8, 1943, and at any adjournment dates; and further ordered, pursuant to a stipulation by the parties, that the books and records, in lieu of their physical production at the office of the Commission, should be made available in the office of Penfield to such

officer and employees of the Commission as might be designated for such purpose (R. 4–5, 11–15; see R. 3, 7–8). Penfield appealed from this order and, on June 30, 1944, the Circuit Court of Appeals for the Ninth Circuit affirmed. 143 F. 2d 746. A petition for a writ of certiorari was denied by this Court on November 6, 1944. 323 U. S. 768. On November 13, 1944, the mandate of the circuit court of appeals was issued, affirming the subpoena order of June 1, 1943, and, on December 7, 1944, that mandate was filed and spread upon the minutes of the district court (R. 5).

Despite the mandate of the circuit court of appeals, petitioners persisted in their non-compliance with the subpoena enforcement order. On January 16, 1945, an officer of the Commission designated by it for that purpose addressed and mailed communications (1) to Young at the office of Penfield, and (2) to all counsel of record who had appeared for defendants in the subpoena enforcement proceeding and the appeal therefrom. This communication advised petitioners of the filing in the district court of the circuit court of appeals' mandate and stated in accordance with the district court's order of June 1, 1943, that this officer would call at the office of Penfield in Los Angeles on January 24, 1945, for the purpose of examining the books and records referred to in the order. A copy of the order was enclosed in the letter (R. 6,

9–15; see R. 80). On January 24, 1945, the said officer and another designated officer of the Commission presented themselves at the office of Penfield and demanded to see the specified books and records. Such demand was refused. (R. 6–7)

On January 24, 1945, the Commission instituted civil contempt proceedings against Young by filing, in the district court, a proposed rule to show cause why Young should not be adjudged in contempt, together with an affidavit in support of the rule (R. 2–15). The district court declined to issue the rule immediately but, instead, issued an order directing Young to show cause why a further order should not be made directing Young to show cause why an order should not be made holding him in contempt of court (R. 15–16; 31).[2]

Petitioners appeared through counsel at the hearing on February 8, 1945, as to whether an order to show cause should issue, but made no offer to produce the books or make them available to the Commission nor made any showing of inability to produce the books. Instead, peti-

[2] This order of the court was issued on January 24, 1945, but is misdated January 23, 1945 (R. 93–94). That this order was actually issued on January 24, 1945, is made clear by the reference in the order to the affidavit which was verified on January 24, 1945, and was filed in support of the rule to show cause (R. 7, 15). Further, the district court order of February 8, 1945, refers to the "order issued by this Court on January 24, 1945, directing A. W. Young * * * to show cause * * *" (R. 17; see also R. 80, 81).

tioners asserted that in view of the pendency of a certain criminal case, they should not be compelled to produce the corporate records for examination by the Commission (R. 32-33). Counsel appearing for petitioners, along with Mr. Lavine, their present counsel, stated that he was more familiar with the facts than Mr. Lavine as he had received the letter from the Commission's designated representative in the absence of Mr. Lavine (R. 64–65, 71), offered various technical comments upon the adequacy of the notice, and suggested lack of proof that Mr. Young had knowledge of it (R. 65–67). It was also urged that service of the order to show cause was improper because mailed to counsel of record and not served upon petitioners by the marshal (R. 27, 30; cf. R. 16–17).

After extensive argument, the court expressed doubt as to whether the Commission should obtain the subpoenaed records of the corporation until after the conclusion of the pending criminal case involving Young, Penfield and others.[3] The court apparently believed that the Commission would not be entitled to make information so obtained available to the prosecution and

[3] This trial was upon an indictment returned in the District Court for the Southern District of California on September 29, 1944 (No. 17230), charging violations of the Securities Act (Section 17 (a) (1), 15 U. S. C. 77q (a) (1)), the mail fraud statute, and the conspiracy statute (see R. 28, 32–33, 47).

feared that this would result if petitioners were required to obey the subpoena (R. 72–73). The court, addressing Commission counsel, also stated that the same records were sought in the criminal case (see note 3, *infra*) and that "in view of the fact you have returned an indictment against the defendants, the urgency of the statute of limitations against them has now passed in the criminal matters" (R. 72). At the conclusion of this hearing, the court issued an order to Young to show cause why he should not be held in contempt, returnable on February 26, 1945 (R. 17–18), and stated that it would on that date decide whether or not to proceed with the contempt proceedings or postpone the matter until after the criminal trial (R. 76). The court made these statements despite the urging of Commission counsel that present enforcement was necessary because examination of the corporate records by the Commission could uncover later or additional criminal violations by the same or other defendants, and that, in any event, examination of the corporation's records might result in providing evidence which would justify other proceedings of a civil or administrative nature and which should not be delayed by the pendency of the criminal case (R. 45, 47–48). At this hearing, Commission counsel repeatedly urged that the sole objective of the Commission was to secure a coercive

order which would enable it to see the books (R. 35, 37, 43, 45, 64).

On February 26, 1945, the district court apparently decided that the records should not be made available during the pendency of the criminal case and postponed the hearing on the order to show cause. The postponement was until May 28, 1945, then to June 25, 1945, and then to July 2, 1945.[4] The decision of the district court to delay action on the contempt proceeding until after disposition of the criminal trial was rendered over vigorous objection voiced by Commission counsel at the February 8 hearing (R. 72–73, 75). As the record indicates, the basic issue to be decided at the February 26 hearing was whether or not the court would hear the contempt

[4] On June 1, 1945, the same court had directed a verdict of acquittal of some of the defendants in the criminal trial, including the present petitioners. Petitioners state in their brief (p. 6) that Marlow, who became a Government witness in the criminal proceeding, produced in evidence "nearly all" of the documents sought by the Government in the subpoena, which subpoena was stated to have been identical with the Securities and Exchange Commission subpoena involved in the present proceeding (R. 32–33, 72). It is not claimed, however, that all of the documents were produced and there is every inference to the contrary from the statements made on behalf of petitioners at the contempt hearings (see R. 33, 51, 68, 75). Such a claim could hardly be made in view of petitioners' three and one-half years' resistance to compliance with the Commission's subpoena.

issue or postpone it until after the trial of the criminal case (R. 76).

When the matter finally came on to be heard on July 2, 1945, almost six months after the Commission first moved for an order to show cause in the contempt proceeding, the court considered the affidavits submitted by both sides (R. 77, 78–79), offered petitioners an opportunity to cross-examine the affiant on behalf of the Commission (R. 83), heard argument, and adjudged Young to be in contempt (R. 85), but refused to grant a coercive decree calculated to coerce production of Penfield's books and records (R. 86). Instead, the court unconditionally ordered Young merely to "pay a fine of $50, and stand committed until paid", with execution stayed temporarily, presumably to give Young an opportunity to pay the $50. At the same time the court gave clear indication that it was not going to compel production of Penfield's records (R. 86–87). Young promptly paid the $50 punitive fine (R. 96) and did not appeal from the order holding him in contempt. After the Commission filed its notice of appeal (R. 20) and after expiration of the time for appeal, petitioners purported by a statement in the brief in the court below to assert a cross-appeal. This purported cross-appeal was later withdrawn by a document filed in the court below.

Holding that "refusal to commit until the order is obeyed, frustrates the remedial purpose of the

legislation creating the right to secure access to the documents" (R. 96–97), the court below reversed the order imposing the $50 fine and remanded the case to the district court "for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question" (R. 98).[5] No mandate has yet been issued.

SUMMARY OF ARGUMENT

The Commission, in the performance of its investigative functions under the Securities Act of 1933, was entitled to the aid of the district court in obtaining access to the subpoenaed books and records of Penfield. The district court's obligation to aid the Commission in the discharge of its statutory functions is at least equally applicable to compelling obedience to the court's own subpoena enforcement order as to issuing such an order in the first instance. Accordingly, the Commission having instituted civil contempt proceedings, the district court erred in assuming that it had unfettered discretion to withhold a coercive decree and to impose in lieu thereof an unconditional fine of $50 not sought by the Commission. Such an order could have no appreciable coercive effect, and when coupled with the indica-

[5] Petitioners state (Br. 9) that the direction for conditional imprisonment was "in addition to the fine." No such statement appears in the opinion of the court below, which, on the contrary, is one of reversal of the order imposing the fine (see pp. 26–27, *infra*).

tion that the court did not expect future compliance, was reviewable like any other order denying the relief to which a civil complainant is legally entitled.

In the circumstances of this case, including the long delay, the continued resistance of petitioners, despite affirmance of the order on the first appeal, and the total failure of the district court to exercise any discretion in the determination of what coercive remedy would be appropriate, it was proper for the court below, in the exercise of its supervisory jurisdiction, to direct a decree of conditional imprisonment to compel production of the records of [illegible]field. There is no merit to petitioner's contention that an unconditional fine having been imposed and paid, Section 268 of the Judicial Code (28 U. S. C. 385) deprives the district court of jurisdiction to impose a coercive decree of conditional imprisonment to prevent continuation of petitioners' contempt.

Petitioner's objection to the sufficiency of the notice fixing a new date for the production of the records after the mandate of the circuit court of appeals affirming the order was filed, constitutes an attack upon the judgment of contempt from which petitioners did not appeal. Indeed, this objection is inconsistent with their appearance in the proceeding and continued resistance and their plea that the judgment of the district court should be affirmed. In any case, the record clearly shows that sufficient notice was given.

ARGUMENT

I

FAILURE OF THE DISTRICT COURT TO ENTER A COERCIVE DECREE SOUGHT BY THE COMMISSION FRUSTRATES THE PURPOSE OF THE ACT NO LESS THAN A REFUSAL IN THE FIRST INSTANCE TO ENFORCE AN ADMINISTRATIVE SUBPOENA, AND THE COURT BELOW WAS WARRANTED IN REVIEWING AND REVERSING THAT ORDER LIKE ANY OTHER FINAL ORDER IN AN ENFORCEMENT PROCEEDING.

The heart of petitioners' case is that, despite affirmance of the subpoena enforcement order, and despite the fact that the Commission was seeking only a coercive decree, the Commission had no right to insist upon the district court's compelling obedience to its enforcement order. Petitioners insist that since it was the court's order, not the Commission's, out of which the contempt arose, the court had an absolute and non-reviewable discretion to determine whether to grant coercive or punitive relief as well as to determine the extent of the punitive relief granted (Br. 14–15). Subsidiary to this contention, it is urged that although the Commission instituted civil contempt proceedings and insisted at all times that it was seeking only a coercive decree, the district court by the device of imposing a punitive, unconditional fine, accepted and paid by petitioners, could (1) exhaust its jurisdiction to grant coercive relief, and (2) convert the proceedings into an exclusively criminal contempt proceeding, and

thereby disable the Commission as an agency of the Government from appealing from the judgment.

It would appear that the district court accepted petitioners' contention as to its absolute discretion to withhold a coercive decree. Since there was no showing of present inability of petitioners to comply with the subpoena enforcement order, the district court's discretion appears to rest at most upon information gained while presiding at a criminal trial in which, it is stated, some, although not all, of the documents sought by the Commission's subpoena were produced (Br. 6). Apparently the district court believed that the Commission should discontinue its investigation in view of the unsuccessful prosecution. The issue thus presented is thus but another phase of the problem of the duty of the courts to aid the administrative agencies in the discharge of their law enforcement responsibilities and, with particular reference to subpoena enforcement proceedings, to grant coercive relief without attempting to forecast the results of the administrative inquiry or otherwise to invade the area of administrative discretion. See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186; *Endicott Johnson Corporation* v. *Perkins*, 317 U. S. 501; *United States* v. *Morgan*, 307 U. S. 183.

1. The investigative powers given to the Commission under the Act (Sections 19 to 22, 15 U. S. C. 77s-v), particularly the provision giving the Commission the right to compel testimony over claim

of privilege (Section 22 (c)), show a legislative intent that the courts should render all proper assistance in enabling the Commission to uncover the facts, and that its investigations should not be permitted to be delayed or forestalled by the contumacy of persons who have been subpoenaed to produce evidence. Section 22 (b) provides the machinery for enforcing subpoenas issued by the Commission in the course of its investigation. Two steps are outlined, both requiring the aid of the courts. The first, an application by the Commission for an order to enforce a subpoena which has been disobeyed, has been completed. However, the subpoena enforcement order thus obtained by the Commission and affirmed on appeal has not been successful in securing compliance with the subpoena. The continued disobedience by petitioners of the order necessitated following the second step prescribed by the statute. Section 22 (b) provides:

> * * * any failure to obey such [subpoena enforcement] order of the court may be punished by said court as a contempt thereof.

Pursuant to this provision, the Commission applied to the court for a contempt order.

The Commission, as an agency designated by the Congress to enforce the Act, was entitled to the support of the district court in its effort to ascertain the facts. Without such support, the Commission's administrative process was blocked at the threshold of its inquiry. Unless the Commission's investigation is brought to fruition, the

statute necessarily fails of its purpose (see R. 64). As this Court said in *United States* v. *Morgan*, 307 U. S. 183, 191:

> Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action.

And see *United States* v. *Ruzicka*, No. 54, this Term, decided December 16, 1946, slip opinion, pp. 8–9.

In the light of this admonition, the district court, by refusing a coercive decree, was derelict in its obligation under the Act. As the court below held (R. 96–97), the district court's "refusal to commit until the order is obeyed, frustrates the remedial purpose of the legislation creating the right to secure access to the documents." The fine of $50, in the face of the court's obligation, was a meaningless and empty gesture. It was as irrelevant to the Commission's purpose of coercing production of the company's records as a mere reprimand; indeed, it served principally as a formal means of terminating the proceeding and amounted in effect to a rescission of the prior enforcement order notwithstanding affirmance on appeal.

Furthermore, even assuming arguendo that there was room for discretion in that regard, it is clear that the reason given by the court for

refusing a coercive order was clearly invalid. The colloquy between the court and counsel for the Commission (R. 86–87) indicates that the court's refusal to impose a remedial penalty was based upon its opinion that in the criminal trial of Penfield, Young and others:[6]

> the evidence was clear and definite and positive from all of the Government's witnesses, that during one period of time this defendant [Young] had nothing whatsoever to do with the Penfield Company. Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

The continuity or extent of Young's association with Penfield and its effect on any possible future prosecution or administrative proceeding furnished no justification for refusing to render a coercive decree calculated to obtain compliance with the district court's order of June 1, 1943;[7] Young, as an officer of Penfield, was subpoenaed to produce Penfield's books and records, not his own. See *Wilson* v. *United States*, 221 U. S. 361. The district court's

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[6] See note 3, *supra*.

[7] Moreover, collateral attack on the subpoena enforcement order is not permissible. *Oriel* v. *Russell*, 278 U. S. 358; *United States* v. *Seidmon*, 154 F. 2d 228, 231 (C. C. A. 7); *Clarke* v. *Federal Trade Commission*, 128 F. 2d 542 (C. C. A. 9); *E. Ingraham Co.* v. *Germanow*, 4 F. 2d 1002, 1003 (C. C. A. 2). We have some difficulty, in any case, in understanding how the court could know in advance of the examination of the records in question, what, if anything, they would show.

order directed that the corporate books be produced for the Commisison's inspection. Young's guilt or innocence with respect to any new violation uncovered in an examination of the books has no bearing on the only issues which were before the court, viz., whether Young was able to produce, but had nevertheless refused to comply with the mandate. *Oriel* v. *Russell*, 278 U. S. 358. The district court by finding Young in contempt indicated that in its judgment he was able but unwilling, however, to produce the books (R. 85, 86). Hence, as we have shown, the district court failed to discharge its duty under the Act to grant a coercive decree.

Moreover, the record clearly shows that even though the order of June 1, 1943, had been confirmed on appeal and hence was final in every respect, the district court had made up its mind not to coerce Young into future compliance therewith. This is made plain not only by the character of its order (R. 87), but also by concurrent statements from the bench (R. 86):

> The Court: * * * The order will stand that the defendant be adjudged guilty of contempt.
>
> Do you have anything to say in connection with the disposition of this matter, Mr. Cuthbertson?
>
> Mr. CUTHBERTSON [Commission counsel]: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court,

if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refused to produce his books and records for our inspection.

The Court: I don't think that I am going to be disposed to do anything like that.

These remarks by the court, and others as well (R. 46, 68, 72, 73, 86), considered in the light of the nominal fine imposed by the court and the prior refusals to grant a prompt hearing on the contempt charges, reveal a fixed attitude of the court which would have rendered futile any attempt by the Commission again to demand production of the records and again to request a coercive decree for contempt. Moreover, such an attempt could be anticipated to produce still further delays. It would seem evident that the court took it upon itself to determine whether it was desirable as an administrative matter for the Commission to examine the records and that it resolved not to require the books to be produced because of its views as to the effect on the investigation of the disposition of the aforesaid criminal case.[8]

[8] The district court's mistaken view that it had a wide discretion with respect to enforcement of the Commission's investigatory powers is also indicated by its several rulings postponing the contempt proceedings (R. 80–81). These postponements were granted merely because of the pendency of a criminal proceeding involving *some* of the persons under investigation by the Commission (R. 76), and despite the fact that the Commission's investigation could lead to other criminal prosecutions against the same or other persons, civil

The right of administrative agencies to subpoena enforcement orders[9] would indeed be empty if those subject to such orders could delay compliance pending meritless appeals from an enforcement order, and thereafter persist in flouting a court order affirmed on appeal. Imposition of a nominal and patently ineffectual fine for contempt of an order affirmed on appeal is an even more serious threat to effective enforcement of the securities laws than failure to enter a required enforcement order in the first place. The need for effective enforcement amply justified the court below in affirming the clear duty of the district court to compel respect for its own enforcement order, and in concluding that this

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injunctive proceedings, or even administrative proceedings against persons subject thereto (R. 45, 47–48), such as broker-dealers registered under the Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. 78). In so doing, the court incorrectly took the position that it had discretion to postpone hearing the application for a contempt order at that time merely because the production of corporate records which the contempt proceedings sought to coerce would be usable in the pending criminal case (R. 73). The fact that the corporate records might be so used against Young afforded him no basis for refusing to produce the Penfield records in compliance with the district court's order. *Sinclair* v. *United States*, 279 U. S. 263; *Wilson* v. *United States*, 221 U. S. 361; *In re Verser-Clay Co.*, 98 F. 2d 859 (C. C. A. 10), certiorari denied, 306 U. S. 639.

[9] *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186; *Endicott Johnson Corporation* v. *Perkins*, 317 U. S. 501; and see *Penfield Co. of California* v. *Securities and Exchange Commission*, 143 F. 2d 746 (C. C. A. 9), certiorari denied, 323 U. S. 768.

could be accomplished only by a coercive contempt order. If persistent disobedience of a court order enforcing a subpoena issued by the Commission is susceptible of being brushed aside with nothing more than a $50 fine, with no promise of further action by the court to enforce its decree, the Commission's investigatory powers under the Act would surely be "frittered away in constant delays and failures of enforcement of lawful orders." *Oriel* v. *Russell*, 278 U. S. 358, 363.

2. It is elementary that obtaining obedience to the court's order, so long as compliance remains possible, is one of the most fundamental purposes of contempt proceedings, not only to vindicate the authority of the judiciary generally but to assure the civil litigant the relief to which he may be entitled in the particular case. As stated in *Bessette* v. *W. B. Conkey Company*, 194 U. S. 324, 327:

> The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded.

The Court quoted in that case with approval from Judge Sanborn's opinion in *In re Nevitt*, 117 Fed. 448, 459 (C. C. A. 8):

> * * * But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before

> it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings.

And see *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450.

The court below held that the proceeding was one for civil contempt (R. 96), and petitioners apparently do not question the fact that all action taken by the Commission was directed towards treating the case as a civil contempt proceeding and as a civil contempt proceeding exclusively.[10] Thus, the case was captioned as a civil action (R. 2, 11, 25), entitled in and filed as a continuation of the original civil action in the district court to enforce the Commission's subpoena (see R. 2, 25, 77–78), was called on the civil calendar (R. 77), and was repeatedly stated by Commission counsel to be a proceeding for civil contempt to obtain compliance with the subpoena enforcement order (R. 35–39, 43, 45, 48, 58–59, 77, 86). Petitioners' counsel recognized the civil nature of the proceeding by citing the Rules of Civil Procedure to support one of his contentions at the February 8, 1945, hearing in the district

[10] The fact that the Commission is an agency of the United States Government does not, of course, preclude it from instituting civil contempt proceedings or otherwise obtaining civil relief in the courts of the United States. *McCrone* v. *United States*, 307 U. S. 61.

(R. 27). The district court also referred to the Rules of Civil Procedure (R. 42, 73). Commission counsel repeatedly urged that coercive relief, and coercive relief only, be granted, and continued to do so in the face of contentions by petitioners' counsel that the proceeding should be treated as a criminal proceeding and the intimation that the court contemplated a punitive judgment in the event that contempt should be established (R. 31–32, 34, 68, 85–86).

Of course, the Commission recognizes that a contempt proceeding can be both criminal and civil in character. See *Union Tool Company* v. *Wilson*, 259 U. S. 107. And, of course, the court may institute criminal contempt proceedings of its own motion. Apart from the question of whether the court took proper steps to warrant a criminal contempt punishment in this case, an issue which may have been foreclosed by petitioners' payment of the fine and failure to appeal therefrom, it is submitted that the imposition of a nominal punitive sanction cannot be used to defeat a civil litigant's right to a remedial decree. While the circumstance that a coercive decree appears impracticable may be a factor in determining whether to institute criminal proceedings or to impose a purely punitive decree, it is clear that the imposition of a punitive decree does not relieve the contemnor from further compliance with an outstanding injunctive order. In this case petitioners made no effort to purge their contempt and continued to dispute the

authority of the outstanding order. Denial of a coercive decree in the circumstances of this case was nothing less than a denial of any effect to the Commission's right to enforcement of its subpoena which had been conclusively adjudicated in the prior litigation.

When, as in this case, the contemnor is still resisting compliance with a subpoena enforcement order and the contempt is thus a continuing one, the imposition of a coercive sanction—whether a fine or imprisonment, conditioned upon further continuance in contempt—is entirely unrelated to the question of what, if any, punishment the court may impose for the past contempt of its order. As this Court stated in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 442:

> * * * Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. * * * If imprisoned, as aptly said in *In re Nevitt*, 117 Fed. Rep. 451, "he carries the keys of his prison in his own pocket." He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

The contemnor with the keys to his prison in his own pocket will suffer punishment only for continuing in contempt.

It was the failure of the district court to deal with this continuing contempt which, the court below held, frustrated the remedial purposes of the Securities Act. Petitioners likewise ignore this continuing contempt in claiming that Section 268 of the Judicial Code, *infra*, p. 38, limits a court to imposing a fine or imprisonment for the single contempt (Br. 14). Assuming the applicability of Section 268 to civil contempts,[11] its provisions do not make the order of the district court imposing the fine such a matter of discretion as not to be subject to review. See *Worden* v. *Searls*, 121 U. S. 14, 26; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450–1. This limitation, moreover, does not apply where one type of punishment is imposed for past action constituting a criminal contempt and the other as a civil sanction to coerce compliance in the future. See *Kreplik* v. *Couch Patents Co.*, 190 Fed. 565 (C. C. A. 1).

If, moreover, as petitioners contend, the court by imposing an unconditional fine disabled itself to impose conditional imprisonment as a means

[11] As the court below noted, *In re Bradley*, 318 U. S. 50, relied on by petitioner, was a case of criminal contempt exclusively, not one where there had "been denied to the opposing litigant a civil remedy to which he was entitled" R. 97. The fine there imposed was an appropriate punishment for the criminal contempt, whereas here the fine was not appropriate in dealing with the civil contempt of petitioner Young. The *Bradley* case holds, of course, that Section 268 of the Judicial Code applies to a criminal contempt. It is not so clear, however, whether this section applies to civil contempts. The language of the

of coercing compliance with the outstanding subpoena enforcement order, then clearly the imposition of the nominal fine was in itself erroneous and could properly be set aside by the judgment of the court below.[12] By such a reversal peti-

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section furnishes no clue. However, in *Lamb* v. *Cramer*, 285 U. S. 217, a contempt was held civil, although not within any of the classes of contempts embraced in Section 268. Further, the legislative history of the section indicates that its purpose was to restrict the power of federal judges to punish for criminal contempt. Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts*, 37 Harv. L. Rev. 1010, 1024–1029; Nelles and King, *Contempt by Publication in the United States*, 28 Col. L. Rev. 401, 525; cf. *Michaelson* v. *United States*, 266 U. S. 42, 66, indicating that statutory limitations on the inherent power of the courts to punish for contempt may not be sustained if applicable where the contempt sought to be dealt with is a continued disobedience to the court's order. See also the argument of Mr. John W. Davis of the House Committee on the Judiciary in support of the bill that became Sections 21-25 of the Clayton Act, quoted in Frankfurter and Landis, *supra*, 37 Harv. L. Rev. at 1057. There is some authority that Section 268 does apply to civil contempts. Thus, conduct not within any of the classes of contempts specified in the section was held (one judge dissenting) to provide no basis for a civil contempt judgment. *In re Sixth and Wisconsin Tower, Inc.*, 108 F. 2d 538 (C. C. A. 7).

[12] Petitioners pressed in the court below both in their original brief and their petition for rehearing their point that the combination of a punitive fine and any coercive remedy (whether or not involving conditional imprisonment) would be beyond the jurisdiction of the district court. After the petition for rehearing the court corrected its opinion so as to make clear that the order imposing the fine was reversed in its entirety (R. 99). The correction added the words "and instead to impose the fine" in the last sentence of the third paragraph of the court's opinion (R. 96), and also changed the first words of the last paragraph of the opinion which

tioners became entitled to the return of the fine. See *United States* v. *Morgan*, 307 U. S. 183; *Cramer* v. *Phoenix Mutual Life Insurance Co. of Hartford, Conn.*, 91 F. 2d 141 (C. C. A. 8), certiorari denied, 302 U. S. 739.

3. Since the contempt order fining Young and refusing the Commission a coercive decree was issued upon a judgment for civil contempt for disobeying a subpoena enforcement order, and the latter order was a final one,[12] the contempt order was appealable by the Commission to the circuit court of appeals. *Lamb* v. *Cramer*, 285 U. S. 217, 220; *Clarke* v. *Federal Trade Commission*, 128 F. 2d 542, 543 (C. C. A. 9); *Enoch Morgan's Sons Co.* v. *Gibson*, 122 Fed. 420 (C. C. A. 8); *L. E. Waterman Co.* v. *Standard Drug Co.*, 202 Fed. 167 (C. C. A. 6); *State Grand Lodge of Pennsylvania* v. *Morrison*, 277 Pa. 41, 120 Atl. 769; see *Union Tool Co.* v. *Wilson*, 259 U. S. 107; see also the Securities Act, Section 22 (a), 15 U. S. C. 77v (a).

Petitioners apparently do not challenge the right of a civil litigant including a governmental agency to appeal from an adverse judgment in a proceeding for civil contempt.[13] Here again their argument

originally began "The order is reversed * * *" so that it now reads "The order imposing the fine is reversed * * *" (R. 98).

[12] *Penfield Co. of California* v. *Securities and Exchange Commission*, 143 F. 2d 746 (C. C. A. 9), certiorari denied, 323 U. S. 768.

[13] As a civil contempt proceeding, no application for allowance of the Commission's appeal from the order fining Young was necessary, as petitioners contend (Br. 11). The

substantially ignores the civil character of the proceedings and assumes that what would otherwise be in all respects a civil proceeding was transformed into a criminal proceeding by the imposition of a nominal, unconditional fine not sought by the Commission (see Pet. Br. 13, 19). If, of course, the imposition of the $50 unconditional fine could work such a metamorphosis, then the petitioners would indeed be in a position to argue that the Commission

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filing of a notice of appeal was sufficient. Rule 73, Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c, which superseded Section 132 of the Judicial Code (28 U. S. C. 228), relating to allowance of appeals. See also *Nye* v. *United States*, 313 U. S. 33. Petitioners assert that an application for allowance of an appeal is required by Section 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 940 (28 U. S. C. 230). This provision, however, merely fixes the *time* within which an application for an appeal must be made, in the cases where such application is necessary. See note by Advisory Committee under Rule 73 of the Federal Rules of Civil Procedure. The cases cited by petitioners, with the exception of *Nye* v. *United States*, 313 U. S. 33, which supports our view, either were decided before the effective date of the Federal Rules of Civil Procedure, or are irrelevant, or involve an appeal by the defendant in a criminal case. Of course, if the instant proceeding were solely for criminal contempt, the Commission would have no right to appeal from the punishment order, whether by notice of appeal or by petition for allowance of an appeal. See *United States* v. *Sanges*, 144 U. S. 310. Finally, there is no merit in petitioners' contention that it was necessary for the Commission, in order to appeal, to take an exception to the order fining Young (Br. 12). Commission counsel made known to the court that the Commission desired a coercive decree (R. 86). That was sufficient. Rule 46 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. See *United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S. D. N. Y.).

as a governmental agency could not appeal from any error or inadequacy in the unconditional punishment so imposed. But the argument is only an assertion in different terms of the basic contention that the district court, although lacking an unfettered discretion to deny the Commission a subpoena enforcement order itself, did have an unlimited discretion to deny coercive sanction to its enforcement order once granted. The statement of this argument carries its own answer.

We recognize, of course, that where both civil and criminal elements are involved in the contempt order, the criminal aspect of the order has been held to be "dominant" and fixes its character for purposes of appellate review. *Nye* v. *United States*, 313 U. S. 33, 42; *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 110; *In re Merchants' Stock & Grain Co.*, 223 U. S. 639, 642; *Matter of Christensen Engineering Company*, 194 U. S. 458; see *Nye* v. *United States*, 313 U. S. 33. These cases do not hold, however, that the inclusion of criminal elements in an otherwise appropriate civil contempt proceeding may negative the right to review of so much of the judgment as relates to the civil contempt, particularly where the civil litigant, denied the relief to which he is clearly entitled, is in no way responsible for the inclusion in the proceeding of issues with respect to criminal punishment. Indeed, the primary significance of these cases is to enlarge, not limit rights of review. Thus the contemnor,

who is a party to the main proceeding, may appeal from a criminal contempt punishment even though the punishment is for disobedience of an unappealable interlocutory decree where an exclusively coercive decree for civil contempt would not be appealable. Where, however, contempt of an interlocutory decree results in both criminal punishment and a coercive decree in respect of the civil contempt, the taking of an appeal by the contemnor permits a cross-appeal by the moving party complaining of the inadequacy of the civil relief. *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 110. Thus, in the instant case, if the subpoena enforcement order were not a final one, Young but not the Commission could have appealed from the punitive fine. Since the enforcement order was a final one, the Commission, as we have shown, was entitled to appeal from the erroneous order imposing only a nominal punitive fine in a civil contempt proceeding.

4. Since the order of June 1, 1943, required performance of an affirmative act, namely, the production of Penfield's books and records, an appropriate means for securing compliance is imprisonment unless and until the order is compiled with. *McCrone* v. *United States*, 307 U. S. 61; *Oriel* v. *Russell*, 278 U. S. 358; *In re Delgado*, 140 U. S. 586; *Clarke* v. *Federal Trade Commission*, 128 F. 2d 542 (C. C. A. 9); *In re Nevitt*, 117 Fed. 448 (C. C. A. 8); *Fenton* v. *Walling*, 139 F. 2d 608 (C. C. A. 9), certiorari denied, 321

U. S. 798; see *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 442.

The court below, after reversing the district court order which imposed a punitive fine on Young, remanded the case to the district court "for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question" (R. 98). We are aware that the contempt statute (28 U. S. C. 385, Appendix, *infra*, p. 38), gives a court discretion whether to impose a fine or imprisonment and that this Court has approved the imposition by a district court of a conditional, coercive fine to compel performance of an affirmative act, committing the contemnor until the fine is paid or the act performed. See *Fox* v. *Capital Company*, 299 U. S. 105; *Doyle* v. *London Guarantee and Accident Company, Limited*, 204 U. S. 599. However, in our opinion, the circuit court of appeals, in the exercise of its supervisory jurisdiction over the district court, was justified in directing the district court to enter an order of conditional imprisonment. This direction could fairly be regarded by the court below, in the circumstances of this case, as the only feasible means of coercing Young to produce Penfield's records, in view of the long continued and unmitigated refusal to comply with the outstanding subpoena enforcement order, the wholly inadequate assistance given by the district court to the Commission's enforcement efforts, and the clear indication that the district court did not intend to coerce further compliance with the

order notwithstanding affirmance on appeal. Compare *Union Tool Co.* v. *Wilson*, 259 U. S. 107. If a conditional fine were imposed and paid to avoid production of these records, the proceeding would of course not terminate; the Commission would be obliged to institute a second contempt proceeding. The net result would be further delay in the Commission's investigation, with the injuries to the public interest and to investors which such delays involve. Indeed, imposition of even a heavy fine could be regarded by the court below as unlikely to coerce production in this kind of a case. The record discloses that petitioners were prepared to go to almost any length to prevent these corporation records from being subjected to scrutiny by the Commission. The inference is justifiable that they felt such scrutiny to be fraught with grave danger of discovery of willful violations of the provisions of the federal securities laws. That kind of danger would more than overcome any reluctance to pay a fine. Moreover, every additional delay obtained by noncompliance would make their chances of escaping justice that much more likely. As stated in *Cobbledick* v. *United States*, 309 U. S. 323, 325, "To be effective, judicial administration must not be leaden-footed."

In the light of the history of the case, the court below adopted, we submit, the only practical course to coerce production of the records. Petitioner Young need only obey the lawful order to produce

the corporate records, in order to escape the conditional imprisonment imposed by the court below.

II

IN VIEW OF PETITIONERS' FAILURE TO APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT HOLDING YOUNG IN CONTEMPT, THE SUFFICIENCY OF THE NOTICE TO PETITIONERS OF THE NEW DATE FOR PRODUCTION IS NOT SUBJECT TO REVIEW; IN ANY EVENT, PETITIONERS HAD SUFFICIENT NOTICE

Petitioners attack the judgment of contempt on the ground that, after the circuit court's mandate affirming the subpoena enforcement order was filed, Young was not given proper notice fixing a new date for the inspection of Penfield's records (Pet. Br. 16). But this objection constitutes an attack upon the district court's judgment of contempt from which petitioners did not appeal. This issue was litigated in the district court and was decided adversely to the petitioners. Since petitioners did not appeal, they were not permitted to urge, in opposition to the appeal by the Commission, objections to the judgment of contempt which were considered and determined against them in the decision of the district court (R. 96). *Le Tulle* v. *Scofield*, 308 U. S. 415; *Helvering* v. *Pfeiffer*, 302 U. S. 247; *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191. The cases cited by petitioners (Br. 18) do not hold otherwise. Moreover, petitioners urge that the judgment of the district court should be affirmed (Br. 20).

Petitioners' failure to challenge the imposition of an unconditional fine makes irrelevant the question of whether the past non-compliance which was the basis for the punitive judgment was sufficiently willful to warrant a penal sanction. In relation to the Commission's effort to obtain a coercive sanction that issue could only be relevant for its bearing upon the necessity for the Commission to seek a contempt judgment to implement the prior enforcement order. That necessity is in turn conclusively established by the position which the petitioners have consistently taken after their appearance in the contempt proceedings; namely, an insistence that they are not required to comply with the enforcement order.

In any event, the record shows that petitioners were fully apprised, both directly and through counsel, that the court's order directing them to produce was again operative following their unsuccessful appeal therefrom, and that the Commission wished to examine the records on a designated date. The letter of notification, which was mailed on January 16, 1945 (R. 6, 9–10; see R. 80), advised them of the filing in the district court of the mandate of the circuit court of appeals. Enclosed in the letter was a copy of the subpoena enforcement order (R. 6, 9, 10–15). The request in the letter conformed to the provisions of that order that the records "shall be made available to such officer and employees of Securities and Exchange Commission as may

be designated, at the office of Respondent [Penfield] * * *" (R. 14). If a demand were necessary,[15] it seems clear that this letter and the enclosure met that requirement. The Federal Rules of Civil Procedure permit service of notices upon the attorney representing the party and such service may be made by mail. Rule 5 (b). See *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302 (C. C. A. 2); *Tilghman* v. *Tilghman*, 57 F. Supp. 417 (D. D. C.). The court having acquired jurisdiction over the person of petitioner Young, no further process was required. *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 454.

Petitioners, however, assert that Young and his present counsel were in fact out of town from a date prior to the mailing of the letter of January 16, 1945, until after the Commission's officers called at the office of Penfield to see the books (Br. 16–17). However, they apparently were in town when the mandate was issued and filed and could have made the necessary arangements to comply (See R. 80). Moreover, the record indicates that the letter was mailed to Young at two addresses, to the office of his present counsel, and to two other attorneys for petitioners (R. 6, 9–10, 15–16), and that it did come

[15] It is arguable that no formal demand was necessary, and that petitioners were under a positive duty to comply with the mandate (see R. 80), which was issued more than two months before the request was made, and filed in the district court over a month before (R. 5).

to the attention of co-counsel for petitioners in the district court proceeding (R. 65). Young could have been reached in ample time. Consequently, the record justifies the finding of the district court that Young's absence from the city was an inadequate excuse (R. 84). Certainly this is correct in view of the fact that, after the contempt proceedings were commenced, there was no offer to comply, only continued resistance. In any case, disobedience of a court order need not be willful to sustain a judgment of civil contempt. *Telling* v. *Bellows-Claude Neon Co.*, 77 F. 2d 584, 586 (C. C. A. 6), certiorari denied, 296 U. S. 594; *National Labor Relations Board* v. *Whittier Mills Co.*, 123 F. 2d 725 (C. C. A. 5).

CONCLUSION

For the reasons stated, the judgment of the court below constituted sound exercise of its appellate authority and should be affirmed.

Respectfully submitted.

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APPENDIX

Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77a, *et seq.*):

SEC. 19. (b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

SEC. 22. (b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal

to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Judicial Code, section 268 (28 U. S. C. 385):

The courts of the United States shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

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